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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LAURA MARKS, GAYLIA PICKLES
AND DONNA VANDIVER,
individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

KATE SPADE AND COMPANY, a
Delaware corporation, and DOES 1-50,
inclusive,

Defendant.

Case No. 3:15-CV-05329-VC
Hon. Judge Vince Chhabria

**JOINT FURTHER CASE
MANAGEMENT STATEMENT
[LOCAL RULE 16-9]**

DATE: August 16, 2016
TIME: 1:30 p.m.
PLACE: Courtroom 4, 17th Floor

1 **CASE MANAGEMENT STATEMENT AND RULE 26(f) REPORT**

2 Pursuant to Local Rule 16-9, a meet and confer session was held on July 25,
 3 2016, between Ari Basser of Markun Zusman Freniere & Compton, LLP, counsel
 4 for Plaintiffs Laura Marks, Gaylia Pickles, and Donna Vandiver, and Dylan Price of
 5 Sheppard, Mullin, Richter & Hampton, LLP, counsel for Defendant Kate Spade and
 6 Company (“Kate Spade”).

7 Pursuant to Local Rule 16-9(d), the parties, by and through their undersigned
 8 counsel, submit this Joint Further Case Management Statement to report on the
 9 progress of the case and provide the Court with an update on certain issues and
 10 positions set forth in the parties’ initial Joint Case Management Conference
 11 Statement and Rule 26(f) Report (*see* ECF Dkt. No. 23), which the parties
 12 incorporate herein by this reference.¹

13 **I. BRIEF STATEMENT OF THE CASE**

14 **The Parties Jointly Submit the Following Statement of the Case:**

15 Plaintiffs’ Second Amended Complaint is a false former pricing action which
 16 alleges violations of the following state laws: 1) California’s Unfair Competition
 17 Law; 2) California’s False Advertising Law, Cal. Bus. & Prof. Code Sections
 18 17500, *et seq.*; 3) California’s Consumers Legal Remedies Act, Cal. Civ. Code
 19 Sections 1750, *et seq.*; and, 4) Texas’ Deceptive Trade Practices Act, Tx, Bus. &
 20 Com. Code Section 17.46, *et seq.*

21 Plaintiffs continue to assert that Kate Spade sold and still sells merchandise in
 22 its outlet stores (“Outlet Merchandise”) by misleading consumers into believing they
 23 are getting mainline designer retail apparel at a significant discount from its former,
 24 original, or regular price. Kate Spade manufactures goods for exclusive sale at its
 25 Outlet stores represented with former “our price” prices. Those goods, however, are
 26 of inferior quality and never actually sold—or intended to be sold—at the purported

27 ¹ The Further Case Management Conference was continued from August 2, 2016, to
 28 August 16, 2016. [See ECF Dkt. No. 56.]

1 former, original, or regular “our price” price. Rather, the prices Kate Spade affixes
 2 to its outlet-exclusive items are intentionally inflated to give the false impression
 3 those goods are more valuable than they actually are, inducing consumers to spend
 4 money they otherwise would not.

5 ***Kate Spade’s Position Re Certain of Plaintiffs’ New Allegations***

6 Kate Spade continues to deny that its “Our Prices” are false and that its outlet
 7 pricing structure is in any way misleading. Kate Spade further denies the additional
 8 allegations in the SAC relating to the allegedly “inferior quality” of the goods sold
 9 in Kate Spade’s outlet stores. Although Kate Spade may design certain products for
 10 sale in its outlet stores, Kate Spade’s outlet pricing is specific to those products. In
 11 other words, Kate Spade’s pricing of its outlet products is based on the
 12 characteristics of those products – it is ***not*** based on the characteristics of other
 13 products with different characteristics (whether higher quality or otherwise).

14 **II. KATE SPADE’S MOTIONS TO DISMISS AND THE COURT’S**
 15 **DENIAL ORDER**

16 On January 20, 2016, Plaintiffs filed an amended complaint (“FAC”). [ECF
 17 Dkt. No. 15.] On May 5, 2016, this Court issued an Order granting Kate Spade’s
 18 Motion to Dismiss Plaintiffs’ First Amended Complaint (“FAC”) with leave to
 19 amend.

20 On May 26, 2016, Plaintiffs filed an amended complaint (“SAC”) [ECF Dkt.
 21 No. 47], which addressed the Court’s concerns regarding the pleading requirements
 22 of Rules 8 and 9(b). On June 6, 2016, Kate Spade filed its Motion to Dismiss
 23 Plaintiffs’ SAC [ECF Dkt. No. 48]. On July 26, 2016, the Court issued an order
 24 denying Kate Spade’s Motion to Dismiss. [ECF Dkt. No. 54.]

25 ***Kate Spade’s Position***

26 Kate Spade is currently analyzing the Court’s Order denying its Motion to
 27 Dismiss Plaintiffs’ SAC and evaluating whether to file a motion for reconsideration
 28 as to Plaintiff Vandiver’s claims under the Texas Deceptive Trade Practices Act.

1 Indeed, it appears that the Court's Order confuses the allegations made by Ms.
 2 Vandiver in the SAC. Specifically, the Court's conclusion that Ms. Vandiver
 3 sufficiently alleges that she has suffered actual economic damages is based on the
 4 Court's finding that:

5 [T]he plaintiffs allege that *Kate Spade's made-for-outlet*
 6 *merchandise, which Vandiver purchased, is of "inferior*
quality," and that Kate Spade has induced consumers to
 7 *purchase made-for-outlet merchandise "at artificially*
inflated prices," i.e., that the purportedly "discounted"
sale prices were still higher than the items' true value.
 8 Those allegations support the inference that Vandiver
 9 received items that were worth less than the price she paid
 for them, such that she suffered actual economic harm.

10 [ECF Dkt No. 54 (Order at p. 2 (emphasis added)).]

11 However, the “inferior quality” allegations in the SAC allege that Kate
 12 Spade’s outlet goods are not of a quality consistent with the listed “our prices.”
 13 There is no allegation in the SAC that Kate Spade’s outlet goods are not of a quality
 14 consistent with the actual selling prices. Similarly, the SAC alleges that the prices
 15 that are “artificially inflated” are the “our prices” – not that the lower selling prices
 16 that customers actually pay. [See, e.g., SAC ¶ 12 (“[T]he public was not informed
 17 that the merchandise manufactured for the Kate Spade New York Outlet shops was
 18 of inferior quality. Although the merchandise was of inferior quality, Kate Spade
 19 touted its *artificially inflated former “our price” price* as a value anchor to create
 20 the *illusion of greater value*”) (emphasis added).]

21 However, in advance of moving for reconsideration (and in order to avoid
 22 such motion), Kate Spade intends to meet and confer with Plaintiffs in an attempt to
 23 resolve the perceived deficiencies in the SAC. In particular, although Plaintiff
 24 Vandiver (the only Texas plaintiff) does not allege that the goods she purchased
 25 were worth less than the prices she actually paid, Plaintiffs Marks and Pickles do, in
 26 fact, assert allegations that at least purport to allege as much. See SAC ¶ 45
 27 (alleging that the “prevailing retail price” for the goods Ms. Marks purchased during
 28 the three months immediately prior to Ms. Marks’ purchase were “less than” the

1 discounted prices that Ms. Marks paid), ¶ 49 (asserting similar allegation on behalf
 2 of Ms. Pickles). Accordingly, Kate Spade would be willing to forego filing a
 3 motion for reconsideration if Plaintiffs agree to file a Third Amended Complaint
 4 adding a similar allegation on behalf of Ms. Vandiver. Kate Spade would further
 5 stipulate that it would not file a Rule 12 motion as to any such Third Amended
 6 Complaint.

7 ***Plaintiffs' Position***

8 The “position” of Kate Spade is simply re-argument of its Motion to Dismiss.
 9 While Plaintiffs are willing to meet and confer with Kate Spade, they presently have
 10 no intention of filing a Third Amended Complaint.

11 Kate Spade’s position misrepresents the allegations made by Texas plaintiff
 12 Ms. Vandiver and does not accurately reflect Texas law. The Court is correct that
 13 Ms. Vandiver has adequately pled that she suffered actual economic harm under
 14 Texas law. The Texas Supreme Court has affirmed that economic damages under
 15 the DTPA include both out of pocket expense and loss of “benefit of the bargain.”
 16 *W.O. Bankston Nissan, Inc. v. Walters*, 754 S.W.2d 127, 128 (Tex. 1988). *See also*
 17 *Arthur Anderson & Co. v. Perry Quip. Corm.*, 945 S.W. 2d 812, 817 (Tex. 1997)
 18 (permitting a plaintiff asserting a claim under the DTPA to recover the greater of
 19 out-of-pocket damages or benefit-of-the-bargain damages measured by the
 20 difference between the value as represented and the value received); *Manon v. Tejas*
 21 *Toyota*, 162 S.W.3d 743 (Tex. App-Houston [1st] 2005) (permitting recovery of
 22 benefit-of-the-bargain damages under the DTPA). Under an expectancy theory,
 23 “loss of benefit of the bargain is the difference between the value ***as represented*** and
 24 the ***value actually received***.” *Id.* (emphasis added). Ms. Vandiver’s claim that she
 25 suffered economic injury is sufficient to assert a claim under the DTPA.

26 Plaintiff Vandiver alleges that she relied on Kate Spade’s false and deceptive
 27 advertising and purchased a handbag and wallet that were falsely represented as
 28 having former prices with an in-store discount of 50%. (SAC at ¶ 53.) Ms. Vandiver

1 specifically relied on receiving the benefit of the bargain, or the difference between
2 the “our price” values *as advertised*, and the discounted prices *actually* paid. This is
3 sufficient to establish that Ms. Vandiver has suffered economic damages under the
4 DTPA.

5 **II. DISCOVERY**

6 **a. Discovery Conducted to Date**

7 Discovery has been stayed since filing of the Complaint on November 20,
8 2015. At the initial Case Management Conference, the Court entered a formal stay
9 pending a ruling on Defendant’s Motion to Dismiss Plaintiffs’ SAC. No discovery
10 has been conducted to date. Plaintiffs believe that the stay of 8 months should be
11 immediately lifted so that discovery can commence.

12 Kate Spade believes that discovery should continue to be stayed until the
13 issues concerning Kate Spade’s potential motion for reconsideration addressed in
14 Section II, above, are resolved.

15 **b. Limitations On Discovery**

16 ***Plaintiffs’ Position:***

17 Plaintiffs believe that, should Defendant’s Motion to Dismiss the SAC be
18 denied, discovery should not proceed in phases. The Manual for Complex
19 Litigation recognizes that information about the nature of the claims on the merits
20 and the proof that they require is a factor in the decision to certify a claim or claims.
21 Furthermore, an analysis of whether the requirements of Rule 23 have been met will
22 entail some overlaps with the merits of the Plaintiffs’ underlying claims. *See*
23 *Comcast Corp. v. Behrend* (2013) 133 S. Ct. 1426, 1432 (class determination
24 generally involves considerations that are enmeshed in the factual and legal issues
25 comprising the plaintiffs cause of action.) Plaintiffs believe that bifurcating
26 discovery will complicate rather than simplify these proceedings and will likely
27 generate additional discovery disputes that will increase the cost and burden of
28 litigation this matter.

1 ***Kate Spade's Position:***

2 Kate Spade contends that, upon commencement, discovery should be
3 conducted in two phases: (1) discovery necessary for Plaintiffs to file a motion for
4 class certification (which may include some merits issues); and (2) discovery as to
5 the merits of the underlying claims (to the extent not already addressed during
6 certification discovery), as well as discovery as to damages. The second phase
7 would also include any expert discovery relating to the merits of the claims and/or
8 damages. Kate Spade believes that such phasing of discovery will allow the parties
9 to conduct focused discovery on the prerequisites for class actions (*i.e.*, numerosity,
10 commonality, typicality and adequacy) without having to simultaneously move
11 forward with boundless merits and damages discovery.

12 Kate Spade recognizes that there may be some overlap between class
13 certification issues and merits discovery. However, Kate Spade believes that such
14 overlap will be minimal, while the lack of any bifurcation will result in burdensome
15 discovery on merits/damage issues that have no bearing on class certification. Kate
16 Spade further believes that the parties should be able to resolve any “close calls”
17 without the need for judicial intervention. Indeed, in the class action experience of
18 Kate Spade’s counsel, although the threat of discovery disputes resulting from the
19 phasing of discovery in the manner proposed by Kate Spade is frequently raised,
20 actual disputes are quite rare.

21 Moreover, there is a clear boundary between, at a minimum, certification
22 discovery and discovery relating to damages, including, for example, discovery
23 relating to Kate Spade’s profits and revenues (Plaintiffs are seeking restitution and
24 disgorgement, among other damages). Kate Spade believes that proceeding with
25 combined class and merits/damages discovery – which will necessarily involve
26 searching for, reviewing and producing thousands of documents not relevant to class
27 certification – will likely frustrate the court’s effort to determine class certification
28 at an early practicable time, as mandated by Fed. R. Civ. P. 23(c)(1)(A). And, it is

1 unlikely that this litigation would progress if a class is not certified in light of the
2 limited damages that would be available to Plaintiff. *See* Manual for Complex
3 Litigation (Fourth) at § 21.14 (2011) (“in cases that are unlikely to continue if not
4 certified, discovery into aspects of the merits unrelated to certification...can create
5 extraordinary and unnecessary expense and burden.”).

6 **III. ALTERNATIVE DISPUTE RESOLUTION**

7 The parties have been in communication with the appointed Early Neutral
8 Evaluator concerning the scheduling of an ENE. The parties will conduct the ENE
9 prior to the Court-imposed deadline, which is currently September 30, 2016.

10 **IV. SCHEDULING**

11 Plaintiffs anticipate filing a Motion for Class Certification. Accordingly,
12 because the trial of this matter would be markedly different if it proceeded on a class
13 basis (as opposed to an action for the named individuals), the parties believe that it
14 is premature at this time to submit a proposed pre-trial schedule.

15 Kate Spade’s position is that the deadline for any class certification motion
16 should be approximately six months from the commencement of discovery.

17 **V. CONCLUSION**

18 WHEREUPON, the parties, by and through their respective attorneys of
19 record, hereby jointly submit this Joint Further Case Management Statement.

20 Dated: July 28, 2016

21 MARKUN ZUSMAN FRENIERE & COMPTON
22

23 By _____ /s/ *Mark A. Ozzello*
24 _____ MARK A. OZZELLO
25 ARI Y. BASSER

26 Attorneys for Laura Marks, Gaylia Pickles,
27 Donna Vandiver and the putative California
28 Class

1 Dated: July 28, 2016

2 WILLIAMSON LAW FIRM, P.C.

3

4

5 By /s/ Che' Williamson

6 CHE' WILLIAMSON

7 MICHELLE EDDINGTON

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12 Attorneys for Donna Vandiver and the putative

13 Texas Class

14

15 Dated: July 28, 2016

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17 SHEPPARD, MULLIN, RICHTER & HAMPTON

18 LLP

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21 By /s/ P. Craig Cardon

22 P. Craig Cardon

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18 Attorneys for Kate Spade and Company

CERTIFICATION

I, Dylan J. Price, am the ECF User whose identification and password are being used to file this Joint Further Case Management Statement. In compliance with Civil Local Rule 5-1(i)(3), I hereby attest that Mark A. Ozzello and Che' D. Williamson have concurred in this filing.

Dated: July 28, 2016

SHEPPARD MULLIN RICHTER & HAMPTON
LLP

By /s/ Dylan J. Price

Dylan J. Price

Attorneys for Defendant